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Utah Supreme Court

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Case No. 7253

IN THE

Supreme Court

OF THE

STATE OF UTAH

JAMES D. LAWS,

Plaintiff,

VS.

INDUSTRIAL COMMISSION OF
UTAH, and GENEVA STEEL COM-
PANY, a corporation,

Defendants.

BRIEF OF DEFENDANTS

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INDEX

	<i>Page</i>
STATEMENT OF FACTS	1
ERROR NO. ONE	4
ERRORS NOS. TWO, THREE AND FOUR	6, 7
CONCLUSION	16

Cases

American Smelting & Refining Co. v. Industrial Commission, 79 U. 302, 10 P. 2d 918	15
Buringham v. Burke, 67 U. 90, 245 P. 977	6
Carter v. Industrial Commission, 76 U. 520, 290 P. 776	5, 9
Denver & Rio Grande Western R. Co. v. Industrial Commission, 66 U. 494, 243 P. 800	14
Jones v. Industrial Commission, 90 U. 121, 61 P. 2d 10	15
Moray v. Industrial Commission, 58 U. 404, 199 P. 1023	15
Salt Lake City v. Industrial Commission, 103 U. 581, 137 P. 2d 364	15
Wilson v. Industrial Commission, 99 U. 524, 108 P. 2d 519	9

INDEX (Continued)

Texts

	<i>Page</i>
3 Am. Jur. 367	6
71 C. J. 1275	6

Statutes

Utah Code 1943, § 42-1-75	14
------------------------------------	----

IN THE
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JAMES D. LAWS,

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vs.

INDUSTRIAL COMMISSION OF
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PANY, a corporation,

Defendants.

Case No.
7253

STATEMENT OF FACTS

In addition to the facts contained in the statement in plaintiff's brief, we wish to direct the court's attention to the following facts which we believe will aid the court in the determination of this controversy.

Plaintiff was first employed at Geneva on July 26, 1946, the very day of his injury. Compensation was paid for one week and wages paid for August 5, 6, 7, 12 and 13, 1946; on August 14, 1946 he was, on his request, further hospitalized and on September 3, 1946, again on his request, released. (R. 125) After an examination by the

Medical Staff of Geneva he was hospitalized in October, 1946 and the operation performed by Dr. Lindem. Release followed on November 8, 1946, in turn followed by further hospitalization and release on December 22, 1946. Geneva paid for all such medical care and hospitalization and compensation up to that time. (R. 92)

On May 23, 1947 the Medical Advisory Board made its recommendations (R. 32):

In estimating this disability we take into account that this possibly may have existed prior to his injury, but believe that he did have some injury, and also feel that there are certain pathologic changes in the spine, and also there is the appearance of a psychoneurosis of long standing. His disability is mainly subjective. We would estimate the permanent partial disability at not over 15% loss of bodily function."

And on June 2, 1947, the Commission notified plaintiff and Geneva (R. 33):

"After carefully considering the recommendations of the Medical Advisory Board, and all matters pertaining to your case, it has been determined that you have suffered a permanent disability amounting to 15% loss of bodily function."

Such was the award made on December 24, 1947, after full hearing before the Commission.

Without consulting the Commission or Geneva plaintiff on January 19, 1948 underwent a further and different operation, a spinal fusion "to correct the defect that had existed prior" to the injury of July 26, 1946. (R. 183-4.)

Plaintiff immediately filed his first petition for rehearing before the Commission, alleging:

“The hospital records and medical discoveries made during the operation (of Jan. 19, 1948) will prove to the commission conclusively that the applicant suffered a more serious injury than was the opinion of the Drs. testifying at the hearing and that the applicant has not been adequately compensated for his injuries.” (Tr. 56-7.)

This petition for rehearing was granted on ~~June~~^{January} 29, 1948. On the rehearing it was stipulated that the testimony and evidence submitted in the hearings of October 22, 1947 and December 9, 1947 would be accepted on the rehearing. (R. 169.)

After hearing, the Commission on July 12, 1948 made its decision:

“The question is whether the applicant was fully compensated by the defendants for the injury received on July 26, 1946.”

and made the following Findings:

“After hearing the testimony in the case and reviewing the same as set forth in the transcript and other documentary evidence received and made a part of the record, the Commission finds that there has been no change in the physical condition of the applicant since the award made on December 24, 1947 and therefore conclude that the award made to the applicant on December 24, 1947 was considered adequate to cover the temporary total disability suffered by the applicant as a result of his injuries received on July 26, 1946 as well as the permanent partial disability which the applicant had on December 24, 1947 as a re-

sult of such injuries.

“The Commission further concludes that the applicant has been adequately compensated for his injuries received on July 26, 1946.”

We do not admit, of course, the statements made in the brief to the effect that the Plaintiff in fact totally disabled; nor do we admit that the *undisputed* evidence was to that effect.

I.

The refusal of the Industrial Commission to render a decision on the rehearing modifying its previous decision of December 24, 1947 on the grounds that the applicant had shown no change in his physical condition since the date of the original decision of December 24, 1947 was contra to law and was error.

In this statement of error it is apparent that plaintiff misconceives the import and intent of the decision of July 12, 1948. On the rehearing held June 9, 1948 the entire record made on the previous hearings was accepted as part of the record. The Commission did not confine itself to the evidence received on the rehearing, but as stated by it, considered all the evidence, including all three hearings. Counsel frankly concedes that applicant failed to show any change in his physical condition—counsel had no alternative—applicant and his own witness testified that there had been no change.

The Commission in fact, as it was bound to do, considered the matter entirely open—a trial de novo—and upon all the evidence made its decision. Upon granting a rehearing the Commission

“ * * * may adopt the prior findings made, if in its judgment they sufficiently reflect all of the material facts as disclosed by the evidence, and make a new order or render a new judgment accordingly, whether it be the same or different effect than was the first or displaced order or judgment.”

Carter v. Industrial Commission, 76 U. 520, 290 P. 776.

The decision of July 12, 1948 quoted above was merely an adoption of the findings of the previous award. The Commission again reviewed all the evidence and the award of December 24, 1947, which was adequate when made, was still adequate and reaffirmed. The evidence presented at the rehearing revealed nothing new to the Commission of substance. That later evidence was merely cumulative and, in the proper exercise of its fact-finding power, the Commission could see no reason for making different findings. The plaintiff presented nothing to persuade the Commission that the facts were anything other than originally found. Plaintiff's argument should be addressed to the Commission, not to this court. His further evidence did not tip the balance of the weight of the evidence in his favor.

We call the court's attention to the last paragraph of the award:

“The Commission *further* concludes that the applicant *has* been adequately compensated for his injuries received on July 26, 1946.” (Italics ours.)

It may be conceded that when a rehearing is granted the Commission may correct any errors it may have

committed in the original decision. But that is not to say that it must render a different decision. The plaintiff was given an opportunity to persuade the Commission that the first award was inadequate, but he failed to do so. On disputed testimony the Commission was of the same opinion still. Dr. Okelberry testified on the first hearing (October 22, 1947) that a spinal fusion was in his opinion necessary. (R. 97) The Commission did not agree. Such operation was performed January 19, 1948 and on June 9, 1948 the same doctor testified that plaintiff would not have gotten well without the operation. (R. 178) The Commission again did not agree.

We do not understand that plaintiff claims there is any lack of evidence to support the findings of the Commission. He has brought this case here contending that the award must be set aside because based on an erroneous ground. But that is not sufficient even were it true; he must show that the decision itself is erroneous. The reasons or grounds given for its decision are no essential part of the decision: .

* * * and it is universally recognized that a correct decision will not be disturbed even though it is based on improper grounds. 3 Am. Jur. p. 367, § 825; Buringham v. Burke, 67 Utah 90, 245 Pac. 977.

Where the finding of the Commission is correct, error in its reason, if any, will not prevent affirmance of the award. 71 C.J., p. 1275, § 1251.

II.

Errors Numbers Two, Three and Four as stated by plaintiff on page 7 of this brief are:

Error Number Two

The Commission committed error in not awarding the applicant further compensation from the 26th day of December 1946 to the date of the rehearing.

Error Number Three

The Commission committed error in not awarding the appellant the medical and hospital expenses incurred incidental to the operation of January 19, 1947 (1948?)

Error Number Four

The Commission committed error in not continuing the payment of compensation to the appellant from the date of rehearing until such time as the Commission should determine in further proceedings the exact date the appellant's condition became fixed and at that time awarding to the appellant such compensation for his partial permanent loss of bodily function as he was then entitled.

Plaintiff's (applicant-appellant) position is:

1. That he should be awarded compensation as for temporary total disability up to the time of the rehearing (Error Number Two); and from the date of the rehearing "until such time as the Commission should determine in further proceedings the exact date the appellant's condition became fixed (Error Number Four).
2. That upon his condition becoming fixed an award as for permanent partial disability should be made. (Error Number Four.)
3. That he should be awarded medical and hospital

expenses incidental to the operation of January 19, 1948.
(Error Number Three.)

Since plaintiff's entire argument is based upon the false premise that he was in fact totally disabled at the time of the rehearing, we thought it proper to discuss these propositions together.

1. The Commission in making its decision of July 12, 1948 did not limit its consideration to the "evidence presented on the rehearing." That order itself recites "After hearing the testimony in the case and reviewing the same as set forth in the transcript and other documentary evidence received and made a part of the record, the Commission finds * * *." This is an express statement that the Commission considered all the evidence, not merely that offered on the rehearing. This court will of course take that statement at its face value. Furthermore, plaintiff expressly stipulated (Tr. 169):

Com. Egan: May it be stipulated that the testimony and evidence submitted in those (prior) hearings may be accepted in this hearing?

Mr. Gibson: It may.

Mr. Heald: Yes.

2. The Commission in its previous award found that plaintiff "suffered certain disabilities and therefore concludes that he is entitled to the benefits under the Compensation Act, i.e., payment for temporary total disability from the 26th day of July 1946 to the 22nd day of December 1946 * * *" and for partial permanent

on the basis of 15% loss of bodily function and the award was made accordingly. Such award was made upon conflicting evidence; is supported by substantial competent evidence and would not be disturbed by this court. The award of July 12, 1948 based on all the evidence concluded that the award of December 24, 1947 afforded plaintiff adequate compensation for temporary total disability (as well as for permanent partial) and thereby adopted the findings and conclusions of the earlier award. It may not be successfully contended that the Commission was bound to reach a different conclusion—the act of the Commission in granting a rehearing did not guarantee a greater award than that already made. The Commission granted a rehearing to afford plaintiff an opportunity to present further evidence in an attempt to persuade the Commission that it was in error. The plaintiff did not sustain the burden and the Commission was of the same opinion still.

Carter v. Industrial Commission, *supra*, 76 Utah 520, 290 Pac. 776.

3. The award as made on December 24, 1947 and as reaffirmed July 12, 1948 was based on substantial, competent although disputed, evidence and should not be disturbed by this court.

“It appears to be the contention of the plaintiff that this court will review the record to determine wherein lies the preponderance of the evidence and affirm or set aside the denial of award or judgment of the Commission accordingly. But this we are not called upon, nor are we at liberty to do. * * * We are called on, in this case, merely to determine whether there is

any substantial evidence to support that decision. Wilson v. Industrial Commission, 99 Utah 524, 108 Pac. (2) 519.

In the ordinary case it is not incumbent upon defendant to show the evidence that supports the award made by the Commission; but rather the plaintiff must show wherein the evidence does not support the award as made. However, since plaintiff in the case at bar states many times that the uncontradicted evidence is that plaintiff was in fact totally disabled, we ask the court's indulgence while we refer to some of the evidence which counsel would have this court and the Commission ignore.

A. As to temporary total disability—(the injury to the coccyx had been taken care of prior to the first hearing. R. 97)

Dr. Hatch, R. 117:

* * * *

Q. Did you find in this man any injury to the disc between the vertebra?

A. I didn't find any that I could make out.

I told him if I had a back like this and had infection in the throat and tonsils and prostate and sinuses that I would have them taken care of, and that he would be much better.

Dr. Lindem (R. 125-6)

A. After preliminary examination which occurred over a period of days, and taking a blood count and urinalysis, blood pressure and temperatures. I myself reached the conclusion that it was a controversial matter as to whether Mr. Laws

had a fractured coccyx. The presence of the spondylolisthesis and also the osteoarthritis and the presence of pyorrhea was noted. It was not in a great degree and probably because of recommendations, which were not entirely in agreement among the orthopedic men, Dr. Pemberton and Huether. It was discussed with Dr. Wright and the hospital staff. We concluded that inasmuch as Mr. Laws complained of pain in his coccyx at the time. It had been demonstrated in our findings that the complaints were entirely inconsistent, but they finally seemed to concentrate on the coccyx region. I did not agree that this had been fractured. However, Dr. Okelberry said it was fractured and Dr. Huether thought it might be fractured. I proceeded to operate the coccyx. He was making complaint out of proportion to a fractured coccyx. However, we removed it and he made recovery. I sent him to a Masseur, and Mr. Laws would not permit the masseur to do any massaging. The masseur complained that he would not let him proceed with the massage and physiotherapy that we recommended, so we stopped that manner of treatment. Then when he had him up and around he began to complain in different regions of the body. We found he was lying in bed in the morning until the doctor made the rounds, and then he would be most agile. After a period extending to the 8th of October, a period of nearly a month, we felt that with the observation and examination that we had carried on with Mr. Laws, that he was physically able as he was at the time of his pre-employment physical examination, and that he should be required to go back to work, and we so recommended and discharged him from the hospital. In my absence from the city at the time Mr. Laws quit work last December and came to my office, my associate, not knowing what to do, sent him to the

hospital again. We came to the same conclusion, that whatever disability he had at the time of the injury we had relieved and no residual from those injuries, and had put him back in a state that was comparable to his pre-employment examination. We felt he had no residual. We employed orthopedic men and had the Hospital Staff and my own associates at the office and on recommendation of the Industrial Commission he was brought up for a Medical Board hearing. We had Dr. Wright perform a complete neurological examination, which was done, and his report is in the record. I have not examined Mr. Laws since. He was discharged from St. Mark's Hospital in December. Except for observation in the room, I don't know anything about him.

The Medical Advisory Board's recommendations of May 23, 1947 (R. 32) :

"In estimating this disability we take into account that this possibly may have existed prior to his injury but believe that he did have some injury, and also feel that there are certain pathologic changes in the spine and also there is the appearance of a psychoneurosis of long standing. His disability is mainly subjective. We would estimate the permanent partial disability at not over 15% loss of bodily function."

And Dr. Stewart A. Wright, who, at the request of the Commission examined plaintiff March 27, 1947, (Tr. R. 26-8) :

"It seems to me that this patient greatly exaggerates and even invents complaints and I do not believe there is any indication for surgery at this time. I would suggest that a settlement be worked out if possible, at a disability not to exceed 5% would be reasonable."

Plaintiff seems to be of the opinion that only that evidence offered at the rehearing is to be considered.

B. As to permanent partial—the evidence recited above also supports the Commission's finding that an award based on a 15% loss of bodily function was adequate compensation. Such award was not only supported by substantial evidence, but gave the plaintiff the absolute maximum.

C. As to medical and hospital expenses:

At the original hearing Dr. Okelberry stated it as his opinion that the spinal fusion operation was necessary. He performed that operation and after doing so was of the opinion that it had been necessary. Dr. Lindem and Dr. Wright disagreed and the Commission, accepting what to it was the more credible testimony, found that such operation was not necessary. It is not enough for plaintiff to show that the operation was necessary to cure a congenital defect; he must show that it was made necessary by the accidental injury. And therein plaintiff has failed.

Plaintiff concedes that the operation of January 19, 1948 was performed without the consent, written or oral, of the Commission. The Medical and Surgical Fee Schedule issued by the Industrial Commission of Utah, effective September 1, 1947, provides in part:

11. Necessary Attention.

No patient will be permitted to change from one hospital to another, or from one doctor to another without first fully explaining in writing his

reasons for desiring such change and securing the written consent of the Commission. When unauthorized charges are made the patient must pay for such change.

When, on January 19, 1948 the spinal fusion was performed, the order or award of December 24, 1947, while not yet a final award (in the sense that time for review had elapsed), had not been vacated or set aside. It was a valid order until vacated or set aside. That award was a finding that the spinal fusion was *not* necessary; yet plaintiff changed from Dr. Lindem to Dr. Okelberry, from St. Mark's Hospital to the L.D.S. Hospital; all without any consent of the Commission, and this in face of the Commission's view that the operation was not necessary. After the operation was performed the Commission reaffirmed its position. The findings being such, and no consent having been obtained, we may well ask on what theory can Geneva be required to pay for the operation? Section 42-1-75 does not require an employer to pay for such medical and hospital services as the patient may desire or even what he feels to be necessary, but only such "as may be necessary."

IV

If it be said that the award of the Commission does not contain sufficient or proper findings to sustain the award, we refer the court to the following rules which are well established in this jurisdiction:

1. The Commission is not required to make any written findings.

Denver & Rio Grande Western R. Co. v.

Industrial Commission, 66 Utah 494, 243 Pac. 800.

2. If no findings are made this Court can supply them all.

Salt Lake City v. Industrial Commission, 103 Utah 581, 137 P. (2) 364.

3. In the absence of findings this court will presume that had they been made they would have been such as to support the decision; it cannot be assumed the Commission would have entered a decision contrary to what they believe the facts to justify.

Moray v. Ind. Com., 58 Utah 404, 199 P. 1023; Jones v. Ind. Com., 90 Utah 121, 61 P. 2d 10; American Smelting & Refining Co v. Ind. Com., 79 Utah 302, 10 P. 2d 918.

The record herein will sustain findings to the effect that:

- (1) Temporary total disability extended from July 26, 1946 to December 22, 1946.
- (2) Temporary total disability ended December 22, 1946.
- (3) Physical condition became fixed December 22, 1946.
- (4) Permanent partial disability suffered was a 15% loss of bodily function.
- (5) No surgery or medical or hospital services were necessary after December 22, 1946 and the operation performed January 19, 1948 by Dr. Okelberry was not authorized by the Commission and was not necessary

to treat the patient for any condition caused by the injury of July 26, 1946 or for any aggravation of a pre-existing condition due to the said injury.

Which findings we must assume the Commission would have made had it made findings. It's award was based upon the assumption that such were the facts.

CONCLUSION

In its award of July 12, 1948 made after the rehearing the Commission adopted and reaffirmed the previous award of December 24, 1947. The award, being based upon substantial, competent evidence, should not be upset by this court.

Respectfully submitted,

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